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DISTRICT OF DELAWARE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA	:	
	:	CR CASE NO. 06-73 GMS
vs.	:	
	:	
DION L. BARNARD	:	
Defendant	:	

DEFENDANT'S BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

I. INTRODUCTION

The Defendant, Dion L.Barnard, by and through his attorneys, Joseph A. Ratasiewicz, Esquire and Nicholas Casamento, Esquire, filed a timely Motion to Suppress Evidence and Statements. Two (2) hearings were held, the first being on July 19, 2007 and the second on September 17, 2007 in which the Government produced witnesses and testimony was taken. It is the Defendant's position in his Motion that certain items were illegally seized by the Government in violation of Defendant's rights against illegal search and seizure. In addition, certain statements alleged to have been made by the Defendant were likewise taken in violation of Defendant's constitutional rights.

II. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Facts

(1) That on April 28, 2006, the Government had issued a complaint against the Defendant alleging a sale of cocaine to a government informant;

(2) That said complaint alleges that the alleged sale took place on January 12, 2006;

(3) That prior to June 14, 2006, the Defendant was asked by his New Castle County Probation Officer, Angela Latsko, to appear at her office for a parole visit;

(4) That prior to Defendant's arrival at the Probation Officer's office on June 14, 2006, Parole Officer Latsko had been made aware of and had seen the Government's complaint alleging the Defendant's sale of drugs;

(5) That upon Defendant's arrival to his Probation Officer's office, he was detained by said officer and cuffed due to the outstanding complaint from the Government;

(6) That Parole Officer Latsko transferred custody from herself and her office to the Government's DEA Agents upon their arrival;

(7) DEA Agents Miller and Collins assumed custody of Defendant and re-hand cuffed him with the government's handcuffs;

(8) That Parole Officer Latsko received verbal approval from her supervisor, Carlo Pini, to conduct "an administrative search" of the Defendant's residence;

(9) That Parole Officers Latsko, Pini, Fentress and Becker went to 431 Howell Drive on June 14, 2006 to conduct said search;

(10) That prior to leaving the New Castle County Probation Office, Latsko informed Defendant in the presence of DEA Officers that the probation office was going to search Defendant's residence to search for any drugs or drug paraphernalia;

(11) That after Parole Officer Latsko informed Defendant of the administrative search for drugs and drug paraphernalia, Special Agent Miller asked if "we could also search" the residence;

(12) Defendant's response to Special Agent Miller's request was in the affirmative;

(13) Defendant was then transported by DEA Agents in their car to 431 Howell Drive, New Castle, Delaware;

(14) Upon arrival, Parole Agents Latsko, Pini, Fentress and Becker entered the residence upon receiving further consent to search from a Darinda Richardson, an apparent occupant of the residence;

(15) The Parole Agents' search yielded no drugs or drug paraphernalia;

(16) Certain other items were seized from 431 Howell Drive by New Castle County Parole Agents which were unrelated to the administrative search conducted by said Parole Agents;

(17) DEA Agents did not directly partake in the search and did not physically seize items from 431 Howell Drive;

(18) Certain items (i.e. envelopes with writing on them, money, pictures, and a car title) were seized by Parole Agents and turned over to DEA Agents while at 431 Howell Drive;

(19) Both at the New Castle County Parole Office and while at 431 Howell Drive, DEA Agent Miller "Mirandized" Defendant;

(20) Agent Miller read Miranda warnings per a DEA-13A card which is a little yellow Miranda card which was neither produced nor entered into evidence;

(21) After the reading of the Miranda warnings per the DEA-13A card and then being asked are you willing to answer any questions, Defendant stated "who set me up";

(22) At no time did DEA Agents indicate to the Defendant the extent of their search request;

(23) At all times during said search, seizure and questioning of Defendant, DEA Agents were fully aware of the extent of New Castle County Probation Officers search and that Defendant had consented to said search for any drugs or drug paraphernalia;

(24) The Defendant did not sign a formal consent to search;

(25) Agent Miller did not conduct the search that he asked consent for;

(26) During the search and seizure of the items at 431 Howell Drive, Defendant remained in custody with DEA Agents in a vehicle and did not enter the residence.

Conclusions of Law

(1) For a warrantless search and seizure to be proper, four factors must be present: (1) the officer must have arrived lawfully at the vantage point from which the object was seen; (2) the object must have been in plain view; (3) the incriminating character of the object must have been immediately apparent; and (4) the officer must have had lawful right of access to the object seized. See Horton v. California, 496 U.S. 128. 142, 110 L. Ed. 2d, 112, 110 S. Ct. 2301 (1990); see also United States v. Menon, 24 F. 3d 550, 559 (3d Cir. 1994); United States v. Benish, 5 F. 3d 20, 24 (3d Cir. 1993); United States v. McCoy, 824 F. Supp. 467, 472 (D.Del.1993).

The Government must demonstrate either that the seized object was in plain view and that the incriminating nature of the object was immediately apparent. United States of America v. Michael Alexander, 73 F. Supp. 2d 489, (U.S.Dist. 1999)

(2) That the incriminating character of the objects seized, i.e. the photographs, the envelopes with the name Ross on them, the car title and money was not immediately apparent and therefore in violation of the Plain View Doctrine. United States of America v. Michael Alexander, 73 F. Supp. 2d 489, (U.S. Dist. 1999)

(3) When items are illegally seized in violation of the Fourth Amendment they are excluded from being offered into evidence as well as any derivative evidence therefrom as these objects are Fruit of the Poisonous Tree. Wong Sun v. United States. 371 U.S. 471, 484-85, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); United States v. Herrold, 962 F. 2d 1131, 1137 (3d Cir. 1992).

(4) That Miranda warnings are required to be given to someone in police custody or under arrest prior to engaging that person in any conversation, i.e. such as asking consent to search their premises. Miranda v. United States.

(5) That Federal Agent Miller's testimony regarding his giving Miranda rights to the Petitioner/Defendant were inadequate as a matter of law because Agent Miller failed to state with specificity what the nature of these Miranda warnings were or, in the alternative, as the Agent testified he did not produce or read from the Miranda card to the Court which he claims he read at the time of the arrest and questioning of Defendant/Petitioner. Miranda v. United States

(6) Where Police (or Federal Agents) use a Parole Officer's authority to circumvent constitutional requirements to further a criminal investigation, the Parole

Agents are acting as "stalking horses" for Police. United States v. Watts, 67 F. 3790, 794 (8th Cir. 1995); United States v. McFarland, 116 F. 3d. 316-18 (8th Cir. 1997).

(7) The scope of a consensual search is limited to that which is reasonable under the totality of circumstances.

III. ARGUMENT

It is abundantly clear from the testimony of Parole Agent Latsko that she informed Defendant Barnard of Probation and Parole's intent to conduct a search of Defendant's residence. (N.T. 63) It is further clear that said search was premised on a Federal Complaint involving the alleged sale of drugs. (N.T. 13) Parole Agent Latsko further informs that said search is to look for drugs and for drug paraphernalia. (N.T.75) All of the above information was relayed to Defendant while he was in custody and in the presence of Federal Agents. (N.T.)

Agent Miller was aware that Probation and Parole was going to 4321 Howell Drive to search for drugs and drug paraphernalia (N.T. 10), per Latsko's office inquiry in Miller's presence.

There can be no doubt that the search and seizure conducted by Probation and Parole resulted in no finding or seizure of drugs or drug paraphernalia. (N.T. 15) Further, the items seized by Probation and Parole could not readily be considered to be incriminating in character. To the contrary, the items (i.e. letters, envelopes, pictures and car title) seized could not in any way be considered drugs or drug paraphernalia. And, as per Horton and Menon, supra, even if the officers arrived lawfully and had a lawful right of access, and the objects were in plain view, the incriminating character of the objects was not immediately apparent; and, as such, the seizure of said items was illegal. Alexander, supra.

Defendant's scope of consent to search was limited to that which is reasonable under the circumstances. Given that the Defendant, Probation and Parole, and the Federal Agents were all present when Defendant was informed of the drug charge as well as Probation and Parole's intent and scope of their search, it is clear that the Defendant did not give consent to search for items beyond drugs and drug paraphernalia.

Even if the Government should argue that it did not execute on Defendant's consent to search, they cannot hide behind the Probation and Parole's search per Watts and McFarland, supra. Clearly, Agent Miller indicated that neither he nor his agents seized the items; yet, said items ended up with said Agents. It is also apparent that no search warrant was ever applied for regarding the Defendant and the search of his residence. And, given the six (6) months between the alleged sale of drugs and the apprehension of Defendant on June 14, 2006, it is unlikely that any Court would have authorized a search.

The only way the Federal Agents could gain access to Defendant's residence was to use another agency's authority which is exactly what they did here. When Agents use another's authority (i.e. Probation and Parole) as a ruse, it becomes an illegal search per Watts, supra. The Agents' request for consent from defendant was merely an excuse to help justify their otherwise illegal search and seizure. Besides, according to Agent Miller, nothing was seized by Federal Agents, so why the consent requests on two (2) separate occasions if not to avoid a constitutional challenge.

IV. CONCLUSION

Defendant hereby requests that all evidence seized at 431 Howell Drive be suppressed in violation of his Fourth Amendment rights.

Respectfully submitted:
FRONT STREET LAWYERS, P.C.

BY:__________________________________
JOSEPH A. RATASIEWICZ, ESQUIRE
Attorney for Defendant

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CERTIFICATION OF SERVICE

I, **JOSEPH A. RATASIEWICZ, ESQUIRE,** attorney for Defendant, certify that a copy of the within Brief in Support of Defendant Motion to Suppress and accompanying documents was served on the following individuals on **October 15, 2007**.

Shannon Thee Hanson,Esquire
U.S. Department of Justice
U.S. Attorney's Office,District of Delaware
The Nemours Bldg.
1007 North Market Street, Suite 700
P.O. Box 2046
Wilmington, Delaware 19899-2046
via E-mail and 1st Class U.S. Mail Postage Prepaid

and

Honorable Gregory M. Sleet
U.S. District Court for State of Delaware
844 King Street, Room 3124
Wilmington, Delaware 19801
via Hand Delivery

Respectfully submitted:
FRONT STREET LAWYERS, P.C.

BY: ______________________
JOSEPH A. RATASIEWICZ, ESQUIRE
Attorney for Defendant

Date: 10/15/07